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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM 1931

No. 33

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY,

Appellants,

against

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Appellees.

PETITION OF HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLANT, FOR REHEARING.

PARKER MCCOLLESTER,
Attorney for Hoboken Manufacturers' Railroad Company, Appellant.

was beyond the Commission's power to correct the first order in this respect by its second order, and that the second order was invalid in that it "undertook retrospectively to change an existing agreed rate." The decision disregards the effect of Sections 16 and 16 (a) of the Interstate Commerce Act and the nature of the second order.

(2) The Court should reconsider its decision that the first order failed to indicate when it should take effect, as required by Section 15, paragraph (2) of the Interstate Commerce Act; that "no future day was prescribed", and that "accordingly the order did not become operative and was wholly ineffective". Such a decision denies effect to the plain intention of the Commission, as indicated by the language of its report and order.

(3) The Court's decision proceeds from a construction of the provisions of Section 15, paragraphs (2) and (6) of the Interstate Commerce Act, which operates to defeat the intent of other provisions of the Act, including Section 1, and which works injustice to the appellant, Hoboken Manufacturers' Railroad, and will work injustice to other small railroads similarly situated.

ARGUMENT.

Statement.

In the Spring of 1926 the Hoboken was for the first time confronted with the fact that shipments of raw silk from the Pacific Coast consigned to Hoboken would arrive over its trunk line connections and that it would have to receive them from these connections and make delivery.

The joint through freight rate for the transportation of this silk was $9 per 100 pounds. The Hoboken had previously agreed with its trunk line connections that on less than carload shipments of freight the Hoboken's division of joint through freight rates should be 5¼ cents per 100 pounds. While, to the extent that the shipments were less than carloads, silk would come within this agreement, yet since the Hoboken had never previously handled raw silk under the $9 rate (R. 20), it was clearly not within the contemplation of any agreement between it and the trunk lines that the division of 5¼ cents on ordinary less than carload freight was a proper division to the Hoboken out of the $9 rate on silk. Especially was this so in view of the character and expense of the terminal services involved in handling silk. The Hoboken, by its complaint alleged that it estimated that it would cost it at least 25 cents per 100 pounds to handle the silk shipments because of the necessity for providing guards, insurance, and special switching and handling (R. 59); that immediately upon learning that shipments were shortly to move over its line, it requested its trunk line connections to agree to a compensatory division (R. 60), and that the trunk lines refused to do so, insisting that the Hoboken should receive only its division of 5¼ cents agreed to on ordinary freight. Thereupon the Hoboken filed its complaint with the Interstate Commerce Commission, asking the Commission to determine the just and reasonable division to be received by it out of the $9 rate for handling silk. This was the only practical course open to it. So long as it maintained rates on silk, it could not refuse to accept shipments when they were tendered to it. *Director General v. Viscose Co.*, 254 U. S. 498. Had it attempted to cancel its rates or its participa-

tion in the publication of the joint through rate of $9, its tariffs attempting to do so would undoubtedly have been suspended by the Commission which, following its consistent practice, would have been required to hold that the controversy as to the Hoboken's division was not a justification for cancellation of the rates. *Transit on M. K. T. R. R. Co.*, 140 I. C. C. 558; *Limestone from Illinois Points*, 74 I. C. C. 345, 348.

The evidence before the Commission showed that the actual cost to the Hoboken of handling the silk shipments exceeded 22 cents. The division of 5¼ cents agreed to on ordinary freight therefore represented but one-fourth of the Hoboken's costs of handling silk. The Commission determined that the Hoboken was entitled to a division of not less than 22 cents.

If the Commission's orders are valid in other respects, the effect of the decision of this Court holding that the first two orders of the Commission were null and void on the grounds indicated in the opinion is that the Hoboken, having followed the only course open to it to secure adequate compensation while continuing to perform its public duty, has been, by an error of the Commission as to the form of its orders, deprived of reasonable and adequate compensation and required to transport every silk shipment tendered to it from December 5, 1927, to March 10, 1930, a period of twenty-seven months, at a loss, receiving for its services only one-fourth to one-third of the cost thereby incurred by it. The record before the Commission shows that for five months alone in 1928 the difference between the division of 22 cents found reasonable by the Commission and the division paid by the trunk lines amounted to approximately $17,000 (R. 290-291). Subsequently the volume became considerably greater.

I.

The Court should reconsider its decision that the Commission's second order "was beyond the power conferred" and "was invalid".

The majority of the Court treats the second order, dated May 7, 1929, as though it were an original order under Section 15 prescribing divisions, and holds it invalid as retroactive. The Commission's report and the form of the order, however, clearly indicate that the second order was intended to be an order under Sections 16 and 16 (a) of the Act and not an original order under Section 15.

Section 16 (a) provides that the Commission may grant a rehearing, and that if after rehearing

> "it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly."

Section 16 (6) provides:

> "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

The effect of these provisions was not discussed either in the majority opinion or in the dissenting opinion, both having proceeded upon other grounds. There is nothing in the language of Sections 16 or 16 (a) indicating that the Commission lacks the powers usually possessed by a tribunal to modify or correct its orders *nunc pro tunc*. The Commission, by its first report and order having clearly indicated its intention to make the order effective for the future, it is submitted that if the first order did not so operate because of its form, the Commission had authority,

under Sections 16 and 16 (a) to modify the first order to read as it should have read when originally issued, and to carry out the Commission's clearly indicated purpose in so far as this was within its authority.

Moreover, the reasons which influenced the Court in *Brimstone Railroad & Canal Co. v. United States*, 276 U. S. 104, to hold invalid an order retroactively fixing divisions of through rates not prescribed by the Commission have no application to an order such as the second order of the Commission here.

In that case the Court said, pages 121-122:

> "Obviously a carrier may have assented to a through rate only because of the divisions accorded to it: to permit the Commission to change this arrangement as to past transactions would be exceedingly harsh if not wholly unreasonable."

Plainly the trunk lines did not publish the $9 rate in consideration of the payment of a division of only 5¼ cents to the Hoboken, since before the Hoboken began to handle the silk the trunk lines were themselves performing the terminal service at a cost of approximately 31 cents (R. 82).

Furthermore, even if the second order be considered an order prescribing divisions under Section 15 (6), it was not the sort of retroactive order indicated in that section, namely an order affecting transactions prior to the Commission's decision and dating back to the filing of the complaint. The complaint to the Commission had alleged that the trunk lines were violating Section 1 (4) of the Act by maintaining unjust and unreasonable divisions (R. 60). The Commission in its first report had determined that the division allowed was and thereafter would be unreasonable. If this determination was justified by the evidence the divi-

sion was no less unreasonable in violation of Section 1 of the Act because the effective date named in the first order was August 6, 1926, than it would have been if the order had originally specified December 5, 1927, as its effective date. The second order was designed to correct the first so as to enforce compliance with the Act in accordance with the Commission's findings, but only for the period beginning thirty days after the announcement of those findings.

We submit it was not the sort of retroactive order that is beyond the Commission's power, and that if the first order needed correction, this was accomplished by the second.

II.

The Court should reconsider its decision that the first order failed to indicate when it should take effect, as required by Section 1, paragraph 2, of the Act and "accordingly the order did not become operative and was wholly ineffective".

The majority of the Court decided that the first order, dated November 5, 1927, was inoperative because, although both the report and order indicated a clear intention to prescribe a reasonable division for the future, the Commission, following the interpretation of the statute previously observed by it (the decision of this Court in the *Brimstone* case not having yet been announced), also undertook to render its determination applicable to past shipments by providing that the order should take effect as of August 6, 1926. While the Commission admittedly erred in providing that the order should take effect on August 6, 1926, it is submitted that the order should, in its original terms and regardless of the second order, have been held a valid order as applied to the charges on future shipments. In the opinion of the Court, it is said:

"Unless and until the Commission duly designates a lawful date no carrier can know what is required and the courts cannot command obedience."

In its report, made a part of its first order, the Commission stated:

"We find that on and since August 6, 1926, the division received by the Hoboken out of joint rates on silk from points on the Pacific Coast to destinations upon its line was, *is, and for the future will be unjust and unreasonable* in that it was, *is and for the future may be* less than 22 cents per 100 pounds" (R. 211).

Its order read in part:

"It is ordered, that * * * said complainant shall receive a division of 22 cents per 100 pounds * * *."

"It is further ordered, that this order take effect as of August 6, 1926, and *shall continue in force* until the further order of the Commission" (R. 213). (Italics ours.)

There can certainly be no reasonable doubt in the minds of either the carriers or a court that what the Commission attempted to require was the application of the 22-cent division to all shipments beginning with August 6, 1926 and continuing on into the future. While the trunk lines under the statute were entitled to disregard the order as to the division of charges on shipments prior to 30 days from its date, they could not question that the Commission condemned the existing divisions currently and for the future. They were left in no uncertainty as to this.

The opinion of the Court would be appropriate in the case of an order bearing no indication as to when, if ever, it should take effect. Under such circumstances a court certainly might "not usurp the function of the Commission" of saying when its order should become effective.

But here the Commission itself in plain language indicated the transactions to which it intended that its order should be applicable. We submit that the effect of its lack of retroactive authority under the statute as interpreted in the *Brimstone* case was merely to exempt from the application of the order the division of the charges on the earlier shipments to which the Commission intended it to apply, leaving it applicable, however, to future shipments to which it was also intended to apply and as to which it was lawful. To hold that the statute operated to convert the order, clearly indicating its intent, into one containing no indication as to the transactions to which it should apply, is, we submit, to deny effect to the plain meaning of the words used. The statute did not eradicate the Commission's words. It limited the transactions as to which they were operative.

Section 15 (2), which provides that orders of the Commission

> "shall take effect within such reasonable time, not less than thirty days, * * * according as shall be prescribed in the order * * *"

does not specify how and in what form the "reasonable time * * * shall be prescribed". We submit that language which indicates beyond possibility of doubt the transactions affected is a sufficient compliance with this provision.

We submit that in construing orders of the Commission, and especially orders prescribing divisions of rates for the future, which are legislative in their character, *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 30, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, the same principle should be followed as is observed in construing statutes, namely, that where possible, effect should be

given to the plainly expressed intention of the Commission. *Barrett* v. *Van Pelt*, 268 U. S. 85, 90.

An order which states that it shall take effect on August 6, 1926 and remain in effect thereafter specifies as clearly that it is to be applicable to transactions on December 5, 1927 and subsequent days as if December 5, 1927 had been named in the order rather than the earlier date. Accordingly, we submit that the first order of the Commission complied with the requirement of Section 15 (2).

We agree that when the order was issued, the trunk lines would have been entitled to an injunction restraining the enforcement of the order but only as to past shipments. We submit they are entitled to no more now, that the court below erred in enjoining the first order in its entirety and that this Court should reconsider its decision affirming such a decree.

III.

The Court's decision proceeds from a construction of the provisions of Section 15 of the Act which operates to defeat the intent of other provisions of the Act, including Section 1, and which works injustice to appellant and to other railroads similarly situated.

That the statute as interpreted in the opinion of the majority, works injustice to the Hoboken is apparent, if the Commission's decision was properly supported by the record. But more than this, the effect of Section 15 as so construed, is to deprive carriers, and especially short lines, who cannot dictate rates nor withdraw from joint rates because of inadequate divisions, of the full protection which Section 1 of the Act was plainly designed to afford them in prohibiting unreasonable divisions. For, unless

the Commission has authority under Section 16 (a) to correct its orders retroactively, these carriers have no recourse from technical errors of the Commission as to the form of its orders. A shipper can secure reparation if rates are unreasonable or if the Commission has erroneously made its order in such form as not to be operative until thereafter changed. If divisions are unreasonable or the Commission makes an error as to the form of its order, the sections of the Act here discussed afford the only means of relief; and we submit should be reasonably construed with this fact in view.

Conclusion.

It is accordingly submitted that the opinion of the majority adopts a too narrow and restricted interpretation of the statute and the powers of the Commission thereunder; that as so interpreted the statute works great injustice to the Hoboken Railroad and will work injustice to other carriers similarly situated; that an opportunity should be accorded on rehearing to present further argument upon the points herein indicated, and that the judgment of the Court below be, upon further consideration, reversed.

Dated at New York, N. Y., December 22, 1931.

Respectfully submitted,

PARKER MCCOLLESTER,
Attorney for Hoboken Manufacturers' Railroad Company, Appellant.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition is presented in good faith and not for delay.

PARKER MCCOLLESTER.

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